SUPREME COURT, U. S.
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Nos. 848, 490 and 497

In the Supreme Court of the United States

OCTOBER TERM, 1969

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ARIZONA CORPORATION COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICTS OF MASSACHUSETTS AND OF NEBRASKA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 343

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 480

ARIZONA CORPORATION COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 497

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICTS OF MASSACHUSETTS AND OF NEBRASKA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Inter-

further information was developed, and that full development of the facts pertaining to incentive factors should go forward in another proceeding. Such a proceeding is now pending, and in addition the Commission has considered car supply problems in the car service *Investigation* case, see p. 7, *supra*.

The Commission's determination to go about the task in separate steps is consistent with the 1966 amendment and is within the agency's discretionary power to manage its conduct of its business. As in *New York* v. *United States*, 331 U.S. 284, 343, "there is no reason in law why the Commission need tackle all evils in the rate structure as one. It may take one step at a time".[8] The instant subject warranted two steps. The "basic" rate applies to all cars over all roads. The "incentive" addition applies only to certain types of cars and only to roads not exempted by the Commission. And, as recognized by most of the appellants at one time or another in the *Interim Incentive* case, an added incentive factor cannot logically be determined until the basic system is established. In the meantime, the roads, the Commission, and the courts will have the benefit of experience under the new rates. During this period, the Commission is fully empowered to deal with particularized car shortages through enforcement of car

[8] See also, *e.g.*, *American Commercial Lines* v. *Louisville & N. R. Co.*, 392 U.S. 571; *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150, 153–154; *Securities and Exchange Commission* v. *Drexel & Co.*, 348 U.S. 341, 346–347; *New York* v. *United States*, *supra*; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583–585; *New England Divisions Case*, 261 U.S. 184, 200–201.

service rules and emergency car service orders (49 U.S.C. 1(15)) which can be employed should a railroad leave cars sitting unused. In these circumstances, the Commission acted well within its discretion in concluding the long-pending per diem case without converting it into still another exploration of car supply.

There is no merit in appellants' converse contention that the Commission erred in not determining whether its time and mileage formula would have an adverse or "disincentive" effect on the national car supply. The argument is nothing more than an attempt to bring into the basic per diem proceeding by the backdoor incentive factors properly being considered under Section 1(14) in the separate pending proceedings described above.[9]

B. THE CALCULATIONS OF OWNERSHIP COSTS

The attacks in No. 497 upon the findings and evidence dealing with the costs of ownership to be re-

[9] In fact, the new rates are not necessarily lower than existing AAR rates; if newer cars sustain even average mileage, the time-mileage system is likely to create a higher daily payment than at present. Thus, on this record it is speculative to argue that basic rates computed on a time-mileage system will have disincentive effect on the return of cars to their owners. The $12,500 car which appellants use for illustration (UP J.S. p. 11) would, if moved the average number of miles shown by the 1960 study (Ex. R–8, p. 43), incur the following comparative charges:

Age of car	ICC time-mileage rates	AAR rates
1 year	$4.85	$4.50
10 years	4.48	3.58
20 years	3.75	3.58

turned to the creditor lines involve determinations which are peculiarly for the Commission's broad discretion. The Commission divided the cost of a car into two portions—representing the owner's actual cash investment, and the additional funds which the owner borrowed to acquire the car. The Commission authorized a before-tax return of 9% on the former and 4% on the latter, for a composite rate of 6% before taxes (332 I.C.C. at 213). The contention that the debt-equity split was not supported by the evidence was properly rejected in the court below.[12] That the formula was one not specifically suggested by any party is no ground for reversal. Cf., *Market Street R. Co.* v. *Commission*, 324 U.S. 548, 559–560; *Central Illinois Public Service Company* v. *Federal Power Commission*, 338 F. 2d 682, 685 (C.A. 7). The true context of the agency's statement as to "no evidence" (332 I.C.C. at 212, referred to in UP J.S. at p. 19) dealt with the rejected "cost of equity capital theory" and not the Commission's own finding as to rate of return. A rate of 4% on borrowed funds is not unreasonable on this record, which showed that the average rate on outstanding equipment obligations was 3.849% (332 I.C.C. at 213). Finally, if unabated inflation requires some upward modification after a fair trial, that can be done under the very terms of the order (332 I.C.C. at 230, 234, 256–257).

[12] See Ex. R-211, p. 30; Tr. 6, 8, 10, 15–16, 233, 6815–6816, 10233.

II. THE MASSACHUSETTS APPEAL (NO. 343)

A. THE COMMISSION'S JURISDICTION TO ADVISE AS TO PAST RATES

As detailed in our Statement, *supra*, the longstanding dispute between creditor and debtor roads has led to a number of lawsuits in the New York courts, and those courts asked the Commission's "advice" as to proper rates for the periods in dispute (see 332 I.C.C. at 181). The Commission responded in one part of its decision below. In an argument not made below, appellants now contend that the Commission lacked statutory power to "adjudicate" as to past rates (B&M J.S. 29–32). But no such issue is presented here.

The Commission explained that its findings "* * * as to the reasonableness of the rates charged in the past *are of significance only as an aid to the courts* in settling the amount of damages in the pending lawsuits" (332 I.C.C. at 183; emphasis added). It added that findings as to the past were "made pursuant to the requests of the United States District Court and the Supreme Court of the State of New York" for findings which "may be considered" by those courts (332 I.C.C. at 255). The Commission thus did not "adjudicate" anything, and it needed no "jurisdictional" authority other than the courts' requests. While the agency's advice is entitled to due respect, the courts are, nevertheless, free to accept, modify, or reject it, and the claims will be "adjudicated" by them and not by the Commission. Similarly, the parties to these suits remain free to assert whatever defenses, set-offs, or counterclaims they may have.

During the 1958 litigation of this case, there was a question as to the Commission's jurisdiction over past rates (162 F. Supp. at 293–294; 358 U.S. 68). But that question disappeared by virtue of the New York lawsuits and the requests of those courts. The Commission was clearly empowered to respond to these requests, embracing a matter within its special expertise, and its response was reviewable in the district court proceeding below. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *El Dorado Oil Works* v. *United States*, 328 U.S. 12. Appellants' "jurisdictional" question is thus not presented by the instant case.

B. THE PROPER RATES FOR PAST PERIODS

Appellants present a series of attacks upon various subsidiary details of the Commission's determinations as to past rates. All are directed to matters falling well within the agency's expert discretion or to the weight of evidence, and none are appropriate for review in this Court.

1. *"Repair deficiency" credit.* The lower court properly sustained the Commission's treatment of the "repair deficiency," which arises out of the fact that users frequently repair owners' cars. The Commission held that differences between sums spent and sums received under an AAR billing schedule should, in the first instance, be corrected through that schedule and not as a credit to per diem charges (332 I.C.C. at 190–194).[11] As the lower court reasoned, there is

[11] Changes can and have been made in this billing schedule. (Ex. 1630, pp. 2–8, 295; Tr. 1149–1152, 6636, 9225). As the lower court noted, appellant B&M has caused at least one such change. (B&M App. F6, fn. 4).

"nothing in the statute or in any court decision we know of requiring the Commission to treat the two as inextricably linked" (B&M App. F5–F6). In any event, as appellants concede (B&M J.S. 32), their claims for offsets against the past per diem charges can be asserted as counterclaims in the New York litigation.

2. *Mileage for the past.* It is undisputed that for past years, aside from the 1960 study figures (see p. 5, *supra*), there were no records revealing the number of miles over which any one road moved the cars of any other. Appellants contest the Commission's judgment that therefore no reliable mileage determinations could be made for the years in dispute and its determination of past rates based solely on time. The lower court, however, whose 1958 remand triggered the issue, was satisfied, stating that the "law does not demand the impossible" (B&M App. F6), and it properly declined to compel the Commission to inject a mileage element based only on "surmise" (*ibid.*).[12] Nor did this result impose any improper "burden" upon

[12] After careful exploration, the Commission rejected a method utilized by the hearing examiner—whereby mileage for past years could be estimated with what he admitted to be "limited accuracy" by projecting the 1960 studies backward and forward (332 I.C.C. at 246–247). This method would have required the assumption that the relationships between the number of foreign car miles recorded for any particular road in 1960 and the total number of foreign cars recorded for all roads that year remained constant throughout the years in dispute. It would also have assumed that all roads stood in precisely the same relationship to one another with reference to each carrier's movement of each other's cars in the past years as in 1960. The Commission found that 1960 was not so nearly representative of all other years as to warrant such projections.

the appellants. The "owner" roads, which instituted the proceeding, had the burden of proving that the existing AAR rates were just and reasonable. They failed and those rates were held not to be just and reasonable (332 I.C.C. at 254, 257). But there is no "burden" which should require the owners to produce mileage figures from non-existent records.

3. *Use of average costs.* The lower court correctly approved the Commission's use of average costs in calculating rates for past periods, noting that "[c]osts are not so dissimilar that use of an average figure would work any great injustice" (B&M App. F9). The use of national averages was entirely proper considering that the creditors, for whose benefit the advice was sought, owned some 88 percent of the national car fleet (Ex. R–181). Moreover, there was evidence showing that cars used by the appellants had values even higher than average (Exs. R–24, R–25, R–26).[13]

4. *Adjustments for inflation.* As noted earlier, the prescribed rates compensate the car owner for that portion of his funds actually invested in a car. To measure the impact of inflation upon these investments, the Commission, as an "approximation" or general guide, used a device known as the "Account No. 53 Index," which attempts to show the cost relationship between building a car in 1910–1914 and building the same car in later periods. Appellants would substitute the broad-scale Wholesale Price Index of the Bureau of Labor Statistics (B&M J.S.

[13] At one stage appellants B&M and New Haven conceded the propriety of the use of average car ownership costs (Brief of B&M and NH, April 12, 1965, p. 94; Exceptions of B&M and NH, May 9, 1966, p. 113).

37-38), which apparently would produce a lower rate. But plainly the choice of inflation indices is within the Commission's discretion.

5. *The "zone of reasonableness"*. Appellants argue that, despite the request of the New York courts for advice as to specific rates that were reasonable for specified periods, the Commission nonetheless had authority only to establish "zones" of reasonable rates and appellants can be required to pay no more than the lowest rate within each such "zone". The "zone of reasonableness" concept stems from a carrier's common law right to initiate rates in attracting traffic as against competition, *Texas & Pacific Railway Co.* v. *United States*, 289 U.S. 627, 636, and has nothing to do with per diem payments. The Commission plainly did what the courts' request asked it to do.

C. THE SUBSTITUTION OF HEARING EXAMINERS

Nine years ago, before the new hearing on remand from the Massachusetts district court began, the Commission made a substitution of hearing examiners, because the original examiner was dissatisfied with certain preliminary procedural matters. In 1962 the Commission denied various petitions filed by appellants who apparently sought re-designation of the original examiner (B&M App. G1; 318 I.C.C. 180). The Commission held that nothing in the Administrative Procedure Act precluded relief of an examiner upon his request for reasons adequate to the agency, explaining that it is often necessary to relieve an examiner for reasons other than pure disqualifica-

tion or bias. This common sense approach is essential to efficient administration. As to the claim that the second examiner had not been assigned from a rotation list, rotation is required only "so far as practicable" (5 U.S.C. (Supp. IV) 3105). Given the itinerant nature of Commission hearings, as well as the need to assign cases according to examiners' special expertise, the Commission has long since found that strict rotation is unsuitable for economical and efficient dispatch of its business (B&M App. G7).

In any event there is no conceivable claim of prejudice. Appellants concede (B&M J.S. 17) that the Commission "corrected all of the defects" of which they and the original examiner complained. Moreover, the first examiner presided only at prehearing conferences and neither heard nor received any evidence. Nor is it suggested that the new examiner was unqualified or biased.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be affirmed.

Respectfully submitted.

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